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OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

84-1280

April 4, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer

General Services Administration
Department of the Treasury
Department of Defense
Central Intelligence Agency

SUBJECT: Department of Justice views on H.R. 3987, "To improve the preservation and management of Federal records and for other purposes."

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than

April 11, 1984

Questions should be referred to Gregory Jones (395-3856), the legislative analyst in this office.

11 April - Relayed "no objection" to Greg's office by phone after coordination with components.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosures

cc: Mary Ann Chaffee
Frank Reeder
Adrian Curtis

Completed by 84-1280/1

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Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Jack Brooks
Chairman
Committee on Government Operations
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This presents the views of the Department of Justice on H.R. 3987, a bill "To improve the preservation and management of federal records and for other purposes." The Department of Justice opposes the enactment of this legislation.

H.R. 3987 would establish an independent entity, the National Archives and Record Administration under the supervision and direction of the Archivist of the United States, a Presidential appointee. The bill would provide the National Archives with greater powers and functions than those presently retained under the General Services Administration, (GSA) the agency currently responsible for its management and administration. H.R. 3987 would also amend various statutes pertaining to the Archives, in order to conform with the proposed establishment of the Archives Administration.

We are concerned about certain proposed amendments to 44 U.S.C. §§2905 and 3106 of the Federal Records Act, which would expand the enforcement authority of the Archivist and would provide for the Archivist independently to initiate suit for the retrieval of documents that have been wrongfully removed from the custody of a federal agency, and a proposed amendment to 44 U.S.C. §§3301 of the Records Disposal Act, which would provide for the inspection of agency records by the Archivist to determine whether records are subject to the records retention requirements of the Records Disposal Act. Although we perceive no direct conflict with the Freedom of Information Act, 5 U.S.C. §§552, we oppose both enactment of §203 of the bill, which would amend 44 U.S.C. §§2905 and 3106, and §204 of the bill, which would amend 44 U.S.C. §§3301.

We believe that the existing statutes governing records retention and management provide adequate administrative remedies, pursuant to 44 U.S.C. §§2905 and 3106, for violations of the Federal Records Act, and that the unprecedented establishment of the Archivist's right to designate attorneys, under proposed §203, to represent the Archivist in a retrieval action would be unnecessary

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and unwarranted. Under existing law, when an agency determines that records have been improperly removed from its custody, the agency head, the Administrator of GSA and the Attorney General must make a determination whether to initiate suit to retrieve the documents. See 44 U.S.C. §§2905 and 3106.

The Department is concerned that the proposed amendments would undermine this discretionary exercise of authority by the Attorney General on whether to initiate a lawsuit to retrieve wrongfully removed documents. Further, the amendments would clearly undercut the agency's own determination on whether a retrieval action for documents wrongfully removed from its custody would be justified in a particular instance. In this regard, the bill's reference to 28 U.S.C. §518 as purported authority for such litigation seems curious, to say the least, inasmuch as that statute speaks to the primacy of the Attorney General's litigation authority.

The Archivist should not be given litigation authority. Centralization of litigation authority in the Attorney General was first established in 1870 when the Department of Justice was created. Congress has identified the legal officers who are to protect the rights of the government under the records management and disposal laws codified at chapters 21, 29, 31 and 33 of Title 44 of the United States Code, i.e., the Attorney General and the Department of Justice. Sutherland v. International Insurance Co., 43 F.2d 969 (2d Cir.), cert. denied, 282 U.S. 890 (1930). Such centralization furthers the important policy goals of ensuring that the government speaks with one voice, ensures consideration of the potential impact of litigation upon the government as a whole, and facilitates presidential supervision over Executive Branch policies implicated in litigation. Section 203 seriously impairs these goals.

The Department has serious reservations about §204 of the bill, which would amend 44 U.S.C. §3301, pertaining to the determination of whether a record is subject to the stringent records retention requirements of the Records Disposal Act, 44 U.S.C. §3301, et seq. Essentially, the proposed provision would permit the Archivist to overrule determinations made by an agency head on whether an agency record comes within the purview of the Act. We fear that such a procedure could result in inaccurate determinations on whether documents are subject to the statute. The agency is much more qualified and able to assess the nature of the documents within its custody than the Archivist. We believe that each agency should make its own determinations, based on its expertise and familiarity with

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documents within its custody or possession and under general government-wide guidelines governing such decisions, as to whether its documents are subject to the requirements of the Disposal Act. Under existing law, there are adequate statutory provisions and departmental regulations issued thereunder to achieve the purposes of that Act.

It should be noted that section 204 of H.R. 3987 appears to neutralize 44 U.S.C. §2906(2). Specifically, 44 U.S.C. §2906(2) provides that "Records, the use of which is restricted by law or for reasons of national security or the public interest, shall be inspected, in accordance with regulations promulgated by the Administration, subject to the approval of the head of the agency concerned or of the President." The proposed amendment to 44 U.S.C. §3301 would be in conflict with 44 U.S.C. §2906 and would appear to eliminate the discretionary authority of the agency head or the President to limit access to certain records and would directly conflict with Executive Order 12065, "National Security Information" and Executive Order 12356 (effective date August 1, 1982), regarding access to classified National Security Information. Finally, recent experience has shown that National Archives employees often do not have current full-field investigations or appropriate security clearances necessary to gain access to the various levels of National Security Information or Sensitive Compartmental Information. To permit unrestricted access to sensitive and/or Classified National Security Information could compromise ongoing investigations, reveal the identities of informants, endanger the lives and safety of Department employees and seriously impede the mission of the Department of Justice and possibly endanger national security.

Section 201 and section 102 of H.R. 3987 would broaden the responsibilities and authority of the Archivist beyond those currently held by the Administrator of the GSA. These proposals would, at the minimum, confuse the question as to whether the Archivist can have access to records of the Federal Bureau of Investigation over the objection or without the approval of the Director. The Department is concerned that such language might give Archivist personnel unrestricted access to classified information, informant files, information relating to pending investigations, Foreign Intelligence Surveillance Act records, Title III information, Federal grand jury matters, or tax information provided to the FBI pursuant to 26 U.S.C. §6103.

Additionally, section 102 authorizes the general promulgation of regulations by the National Archives and Record Service (NARS). This section provides that each agency must adopt such orders and

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directives as necessary to conform its activities to the NARS regulations. These provisions would make agencies completely subject to the authority of NARS and would make the Archivist the sole arbiter of any conflict between NARS and an agency. We find this provision to be particularly troublesome.

The Department of Justice recommends against enactment of this legislation.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Robert A. McConnell
Assistant Attorney General

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